U.S. Department of Transportation
Office of the Secretary of Transportation

General Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

December 2, 2005

Vernon A. Williams, Secretary
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Investigation into the Practices of the National Classification Committee
Ex Parte No. 656 (Sub-No. 1)

Dear Secretary Williams:

Pursuant to the Board's request for comments in the above-referenced docket, 70 Fed.Reg. 60881 (October 19, 2005), enclosed herewith for filing are the Comments of the United States Department of Transportation in this proceeding.

Respectfully submitted,

PAUL SAMUEL SMITH
Senior Trial Attorney
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enclosure

Before the
Surface Transportation Board
Washington, D.C.

Investigation into the Practices of the National Classification Committee)	)	Ex Parte No. 656 (Sub-No. 1)

Comments of the
United States Department of Transportation

Introduction

In the current phase of this proceeding the Surface Transportation Board ("STB" or "Board") seeks "to develop a more thorough record regarding charges of abuse of market power" by the National Classification Committee ("NCC"), the organization that classifies freight pursuant to motor carrier agreements approved by the Board. Decision served October 13, 2005. The STB is particularly interested in both the details of an increase in the classification rating of lighting products and fixtures in 2004, and in how the conditions it has imposed on the NCC are working. Id.

The United States Department of Transportation ("DOT" or "Department") is not familiar with the specific facts behind the reclassification in question, and we have no concrete information on the effectiveness of the particular conditions now in place. However, the simple fact that the STB is moved to seek this information supports the point of DOT's prior filings in this proceeding: the lack of any public interest in preferring regulatory oversight to application of the antitrust laws, particularly where, as here, the core activity in question produces efficiencies and other benefits.

Discussion

The Department has repeatedly urged the Board to withdraw approval and antitrust immunity from the NCC. Most recently, earlier this year DOT stressed that procompetitive joint industry standards flourish across the economy, and that they neither have nor need antitrust immunity to attract industry participants and consumers. Ex Parte No. 656, DOT Rebuttal Comments (filed April 21, 2005) at 6; *also* DOT Reply Comments (filed April 1, 2005) at 9.

The Board's conditions are intended to protect shippers by providing them a greater role in the classification process and a remedy (arbitration) in the event of a dispute. *See* DOT Reply Comments, *supra*, at 7. The conditions are, in other words, imposed to make palatable possible anticompetitive elements or consequences of the traditional classification system. But the necessity to craft these conditions and to monitor their efficacy -- which is what the Board does here and every time it reviews activities undertaken pursuant to the agreement -- confirms the poverty of such an approach compared to application of antitrust law in the first place. As we noted previously,

> A policy favoring protection from the [antitrust] laws that preserve competition does not serve the public interest nearly as well as competition itself. Regulatory conditions designed to reduce or eliminate the consequences of anticompetitive activities -- in other words, to approximate free market results -- are inferior to outright disapproval of those activities.
> Id. at 10.

Application of antitrust law allows beneficial industry programs to exist while holding in check any temptation to expand concerted activities into anticompetitive areas. Vindication of the public interest in such circumstances does not depend upon the ability

of regulators to identify particular flaws and to prescribe (hopefully) appropriate conditions. Rather, ongoing exposure to antitrust liability itself creates strong incentives to avoid the improper accumulation or exercise of market power that the STB investigates here, and it provides precisely tailored redress where warranted.

The Board may be reluctant to withdraw approval and antitrust immunity in the face of motor carriers' frequently declared unwillingness to continue to adhere to industry classification standards without immunity. In our view, however, supporters of continued approval and immunity for the NCC agreement both misapprehend antitrust law and at the same time seek to benefit from their purported misunderstanding.

Coordinated action by actual and potential competitors is not always and everywhere condemned as anticompetitive. If it were, interline transportation, in which carriers must agree both on the overall rate and their individual portions, would not take place. Neither are industry standards *per se* illegal. That is true even where, as here, they may be useful in setting rates. Jays Foods, Inc. v. National Classification Commission, 646 F.Supp. 604 (E.D.Va., 1985), affirmed, 801 F.2d 394 (4th Cir. 1986). See also Eliason Corp. v. National Sanitation Foundation, 614 F.2d 126 (6th Cir. 1980), cert. denied, 449 U.S. 826 (1981) (appliance standards); Gunter Harz Sports, Inc. v. U.S. Tennis Association, 665 F.2d 222 (8th Cir. 1981) (sports equipment standards). Such standards must, of course, be applied in a neutral and non-discriminatory manner. Moore v. Boating Industry Associations, 754 F.2d 698 (7th Cir. 1985).

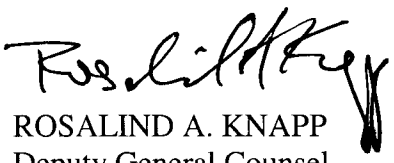
Although DOT continues to seek an expeditious end to antitrust immunity, the STB may wish to consider a transition period during which withdrawal of approval and

antitrust immunity would be deferred. [1] During that time interested carriers and shippers could consult appropriate counsel and antitrust authorities to assess whether and to what extent the NCC procedures and standards might need to be revised in order to comply with antitrust law. At the end of the period, a freight classification system cleansed of anticompetitive elements would function and attract adherents on its own merits. If there are indeed efficiencies and benefits to be gained from such a system, a point disputed by neither carriers nor shippers, there is no question but that it would continue to thrive.

Conclusion

The current freight classification system invites anticompetitive activities and results. Premised as it is on continuing antitrust immunity and regulatory conditions, ongoing oversight remains necessary. By contrast, efficient and productive industry standards throughout every other domestic transportation sector and the economy at large have been promulgated without immunity, yet attract widespread participation. The public interest here is best served as it is elsewhere: by withdrawal of regulatory approval and antitrust immunity from the NCC agreements.

Respectfully submitted,



ROSALIND A. KNAPP
Deputy General Counsel

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[1]/ The Civil Aeronautics Board employed such a transition period when it withdrew antitrust immunity from agreements among competing air carriers that established standards both for thousands of industry travel agencies nationwide and for the uniform system through which the agents reported sales and remitted billions of dollars to the airlines. See Competitive Marketing of Air Transportation, 99 C.A.B. 1 (1982); affm'd sub nom. Republic Airlines v. Civil Aeronautics Board, 756 F.2d 1304 (8th Cir. 1985). Interested parties obtained a Business Review Letter from the Department of Justice and the resulting standards continue to attract adherents through their efficiencies and other procompetitive benefits.